

**International Brotherhood of Electrical Workers,
Local 595 and Hayward Electric Co. Case 32-
CC-463**

May 6, 1982

DECISION AND ORDER

**BY CHAIRMAN VAN DE WATER AND
MEMBERS JENKINS AND HUNTER**

On January 25, 1982, Administrative Law Judge Russell L. Stevens issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, International Brotherhood of Electrical Workers, Local 595, its officers, agents, and representatives, shall take the action set forth in said recommended Order.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Administrative Law Judge found that Hayward's attorney, Paul Simpson, whom he credited, denied that he told Respondent's attorney, Peter Nussbaum, that certain material stored at the jobsite belonged to Gossett, the general contractor. We note that Simpson testified that he told Nussbaum he did not believe Hayward had anything at the site and that he asked whether the material in question could belong to Gossett or another subcontractor. We do not believe, in the circumstances of this case, even if the stored material had technically belonged to Gossett, that this would convert Gossett into an ally of Hayward, and we therefore find that the Nussbaum-Simpson conversation could not serve as a reasonable basis for concluding that Hayward and Gossett were allies.

Chairman Van de Water and Member Hunter agree that this case does not involve a single-employer or integrated-operations question. They therefore find it unnecessary to pass upon whether *Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 560, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Curtin Matheson Scientific, Inc.)*, 248 NLRB 1212 (1980), cited by the Administrative Law Judge, was properly decided.

DECISION

STATEMENT OF THE CASE

RUSSELL L. STEVENS, Administrative Law Judge: This case was heard in Oakland, California, on October 13 and 29, 1981.¹ The complaint, issued March 11, is based upon a charge filed on February 26 by Hayward Electric Company. The complaint alleges that International Brotherhood of Electrical Workers, Local 595 (herein called Respondent or Union) violated Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

Upon the entire record,² and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all times material herein Hayward, a California corporation with an office and place of business in Hayward, California, has been engaged in the construction business as an electrical contractor. Since approximately January 21, 1981, Hayward has been the electrical subcontractor of Gossett and Son, Inc., the general contractor at a Bank of America construction jobsite located at Hesperian Boulevard and Fairmont Drive in San Leandro, California. During the past 12 months, Hayward purchased and received goods and supplies valued in excess of \$50,000 directly from suppliers located outside the State of California.

I find that Hayward is, and at all times material herein has been, a person and an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(1), (2), (6), and (7) of the Act.

At all times material herein Comstock Heating, Cervone Plumbing, and William B. Andrade & Son have been engaged as subcontractors by Gossett at the jobsite. Gossett, Comstock, Cervone, and Andrade each now is, and at all times material has been, a person engaged in commerce within the meaning of Section 2(6) and (7) of the Act.³

Respondent is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

II. LABOR ORGANIZATION INVOLVED

Respondent is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

¹ All dates hereinafter are within 1981, unless otherwise stated.

² Motion to correct transcript, filed December 7 by counsel for the Charging Party, is not opposed of record and is granted.

³ The jurisdictional facts set forth herein were stipulated by counsel.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Background⁴

Bank of America has a building being constructed in San Leandro, California, under a contract with Gossett, the general contractor, dated October or November 1980 with construction to commence the first part of January 1981. As of the date of the hearing, construction had not been completed. Several subcontractors have worked on the project, including Hayward, Comstock, Cervone, and Andrade. A total of six employees of Gossett worked at the jobsite during construction, with one or more on the site each day of construction. Chester Gossett, vice president of Gossett and having approximately equal authority with his father, Cliff Gossett, who is president of Gossett, supervised construction at the site, with complete onsite authority when his father was not present.

Hayward's president is Derald Gephart, who has a partner in the business, William Aydelotte. The two have equal business authority, and they manage Hayward. In doing work at the Bank of America site, they dealt with Cliff or Chester Gossett. Hayward was engaged at the site, doing electrical installation work, from February to September 1981. Two to three Hayward employees were on the jobsite during that time period, approximately 65 to 70 percent of the time, under the supervision of Gephart and, at times, David Jepson, whose supervisor was Gephart. Gephart was on the site approximately three or four times each week, for periods of approximately 30 minutes to 2 hours. No electrical work was done on the site, other than by Hayward.

Gossett built and maintained on the jobsite, a shack approximately 8 feet by 11 feet in size, made of plywood. It was a temporary shack of a kind that commonly is built and used on construction sites. It contained a desk, a telephone, and some shelves, and was used as a storage area for tools, materials, and equipment, as well as for minor business transactions. During times relevant herein, subcontractors of Gossett, including Hayward, commonly stored materials, equipment, and supplies in the shack on a temporary basis.

At all times material herein Respondent was engaged in a labor dispute with Hayward, but had no such dispute with Gossett, Comstock, Cervone, or Andrade.

On February 4, 1981, Respondent sent, and Hayward received, a letter notifying Hayward of Respondent's intention to picket Hayward at the jobsite. On February 5, at various dates thereafter, continuing until February 25, Respondent, in furtherance of its dispute with Hayward, picketed the jobsite, times when Hayward was present at the jobsite, with picket signs bearing the following legend:

⁴ This background summary is based on stipulations of counsel, and on credited testimony and evidence that is not in dispute.

IBEW LOCAL UNION NO. 595
Protests the Fact Hayward Electric
Does not Pay Prevailing Wages for Electricians

On February 5 there were no barriers or gates restricting entrance to the jobsite.

On February 5 Hayward sent a mailgram to Respondent notifying it that Hayward would not be present at the jobsite on February 6, and that Hayward would return to the jobsite on February 9. Respondent received that mailgram.

On February 6 Hayward sent a mailgram to Respondent notifying it that a reserve gate system would be established at the jobsite effective February 9, 1981. Respondent received that mailgram.

On February 9 Gossett attempted to establish a reserve gate system at the jobsite. On or about that same date Respondent picketed solely at the gate reserved for Hayward.

On February 11 Hayward sent a telegram to Respondent notifying it that a reserve gate system was being established at the jobsite. On or about that same date, Gossett attempted to establish a reserve gate system at the jobsite. Respondent received the mailgram.

On February 12 Hayward and Respondent disagreed as to whether a reserve gate system was properly established, and it picketed the entire jobsite.

On February 13 Hayward filed a charge with the Board alleging that Respondent was engaging in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act. On or about that same date the Board commenced an investigation into the charge.

On February 17 Hayward sent a mailgram to Respondent notifying Respondent that Hayward would not be present at the jobsite from 11 a.m. on February 17, 1981, through the remainder of the week and that Hayward would return to the jobsite on February 23, 1981. Respondent received that mailgram.

On February 20 Hayward sent a mailgram to Respondent notifying it that a reserve gate system would be established at the jobsite effective February 23, 1981. Respondent received that mailgram.

On February 23 Gossett established a reserve gate system at the jobsite. On February 23, 24, and 25 Respondent picketed at the jobsite, and observed the established reserve gate system by picketing at the gate reserved for Hayward.

On February 25 Hayward sent a mailgram to Respondent notifying it that Hayward would not be present at the jobsite on February 26, and that Hayward would not return to the jobsite until further notice. Respondent received that mailgram.

On February 25 approximately four or five electrical switchboxes, with metal pipe conduits attached, were stored by Hayward in the job shack on the jobsite. The material was owned by Hayward, and was stored in the job shack pursuant to arrangements made by Jepson with Cliff Gossett.⁵

⁵ As credibly testified by Gossett and Jepson, such temporary storage of materials is customary at construction jobsites and was customary at the jobsite involved herein.

On or about February 25 Gossett removed the reserve gate system it previously had established at the jobsite.

On February 26 and 27 and March 3, Respondent picketed the entire jobsite with picket signs bearing the following legends:

- (i) IBEW LOCAL UNION NO. 595 Protests the Fact Hayward Electric Does not Pay Prevailing Wages for Electricians
- (ii) Gossett and Son Ally of Hayward Electric Unfair To Local 595, IBEW

No reserve gate system was in effect, nor was any employee of Hayward on the jobsite, during those 3 days. Employees of Cervone and Andrade were on the jobsite, and one Andrade employee refused to enter the jobsite on February 26 because of Respondent's picketing activity.

On February 27 the Regional Director for Region 32 of the Board approved Hayward's withdrawal of the charge against Respondent referred to above.

On March 3 Hayward sent a mailgram to Respondent notifying it that Hayward would be at the jobsite between the hours of 4 and 5 p.m. on March 3, for the limited purpose of removing the materials referred to above from the jobsite and that Hayward would not return to the jobsite until further notice. Respondent received that mailgram.

On March 3 Hayward removed the materials referred to above from the jobsite. Respondent ceased picketing at the jobsite when those materials were removed from the jobsite and has not picketed at the jobsite since that time.

On March 12 Hayward sent, and Respondent received, a mailgram notifying it that Hayward would be at the jobsite on March 14.

On March 14 Hayward returned to the jobsite and installed the materials referred to above in the building under construction at the jobsite.

Respondent's contention

Respondent contends that its picketing of the jobsite in all instances was legal, because (a) Hayward was on the jobsite at all relevant times, through presence of its materials, and (b) Gossett was an ally of Hayward.

A. Presence on the Jobsite

The absence of all of Hayward's employees from the jobsite during picketing on February 26 and 27 and March 3 is not in dispute.

Respondent argues that, even though the Union's picketing may have had the effect of inducing secondary employees to respect its picket line,⁶ there is no showing that such was an object of the picketing. The object, rather than the effect, of the picketing is the controlling issue.⁷ Respondent contends that all the criteria of *Moore*

*Drydock*⁸ were met by the Union, and that, particularly, criterion (b) was met; i.e., at the time of the picketing, Hayward was engaged in its normal business at the situs, through the presence in Gossett's job shack of Hayward materials.⁹

The central question in this case has been addressed by the Board in a number of cases. In some instances, absence from the worksite of employees of the primary employer during picketing has been held not to be determinative of an illegal object.¹⁰ In other instances, the Board has held to the contrary.¹¹ No single fact, or group of facts, has been held to be controlling; each case has been decided upon its own merits. The Administrative Law Judge in *Linoleum, Carpet Union*¹² stated, "In all these cases [note: wherein a violation was not found] however, special circumstances were present . . . such as lack of notice that the primary employer's employees were not to work at all or lack of notice of the scheduled hours they were to work; intermittent work; or cessation of work by the primary employer's employees because they were influenced by the picketing."

Not only does the instant case fail to show special circumstances which would make illogical a finding of a violation of the Act; one kind of special circumstance enunciated in *Linoleum, Carpet Union* specifically is negated. Here, Hayward gave clear notice to Respondent, in writing, that its employees would not be on the jobsite February 26, or thereafter until further notice, yet Respondent picketed on that date and thereafter. The matter of notice was emphasized by the Board in its decision in *Brownfield Electric*,¹³ which case is relied on by Respondent. In discussing the complaint against a Union, the Board found, *inter alia*:

Other than by means of the picket line and the legend on the picket signs, Respondent and its pickets made no attempts to inform Brownfield or any of the other contractors of the cause and nature of its dispute with Brownfield. When French, superin-

⁸ *Sailors Union of the Pacific (Moore Drydock Co.)*, 92 NLRB 547 (1950).

⁹ These materials consisted, for the most part, of conduit, boxes, and ducts which had been fabricated by Hayward employees and were ready to be installed at the proper time. As noted in Respondent's brief, the materials were very light, weighing only a few pounds, were easily transportable, and could be handled in their entirety, quickly and easily.

¹⁰ *Plumbers Local Union No. 307 (Meyers Plumbing)*, 146 NLRB 888 (1964); *Local 3, International Brotherhood of Electrical Workers, AFL-CIO (New Power Wire and Electrical Corp.)*, 144 NLRB 1089 (1963); *International Brotherhood of Electrical Workers, Local 861, AFL-CIO (Brownfield Electric, Inc.)*, 145 NLRB 1163 (1964); *Local 373, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO (Marshall Maintenance Corporation)*, 146 NLRB 1058 (1964).

¹¹ *Painters District Council No. 38, etc. (Edgewood Contracting Company)*, 153 NLRB 797 (1965); *Plumbers Local Union No. 519, etc. (H. L. Robertson & Associates, Inc.)*, 171 NLRB 251 (1968); and *Local 254, Building Service Employees International Union, AFL-CIO, et al. (Lechmere Sales)*, 173 NLRB 280 (1968).

¹² *Linoleum, Carpet and Soft Tile Layers Union*, 180 NLRB 241 (1969). The facts of this case are similar to those in the instant case, in that material used in the work were left on the jobsite while the primary employer was absent from the site. As pointed out by the Administrative Law Judge, whether or not the primary employer owned those materials did not control the basic issue.

¹³ *International Brotherhood of Electrical Workers, Local 861, AFL-CIO (Brownfield Electric, Inc.)*, *supra* at 1165.

⁶ This effect is established by the record and is not in dispute.

⁷ *International Union of Electrical Workers v. N.L.R.B.*, 366 U.S. 667 (1961); *Ramsey Construction Co., Inc. v. Painters, Decorators and Paperhangers*, 472 F.2d 1127 (5 Cir. 1973).

tendent of the project, and Jenkins, owner of Brownfield, sought to talk with Coleman, the assistant business manager of Respondent, about the picketing. Coleman declined to talk with them. At no time did French or Jenkins ever inform Coleman or the pickets that Brownfield employees were absent from the project on certain days during the course of this dispute. [Emphasis supplied.]

Respondent contends that Hayward's employees only temporarily were absent from the jobsite, but that is a matter of semantics. Temporary absence from the jobsite on the part of construction employees is a common occurrence, e.g., absences on holidays, weekends, inclement weather, construction pauses and construction sequence. Possibly temporary absence during coffee or lunch break may not preclude picketing, but that is not what is involved herein. Here, Respondent was notified in advance of proposed absence; only a few pounds of materials were left on the jobsite; only Hayward was involved in electrical installation. There is no reasonable basis upon which to conclude that Hayward was present at the jobsite while Respondent picketed, within the meaning of the Act, only because a small amount of materials was stored inside a job shack.

It is found that Respondent picketed the jobsite described above, on February 26 and 27 and on March 3, 1981, with the object of inducing employees of neutral employers to cease to work, or refuse to work, in order to cause those neutral employers to cease doing business with Hayward.

B. The Ally Question

Respondent contends that Gossett became an ally of Hayward because Gossett allowed Hayward temporarily to store material in its job shack, and therefore, Respondent's picketing was lawful. Respondent contends that the temporary and gratuitous nature of the storage is immaterial. Indicative of ally intent, Respondent contends, is the fact that a union representative observed Hayward's foreman, Jepson, at the time of storage, pointing out to Gossett the proposed installation location of the stored materials. According to Respondent, that observation created a suspicion that Gossett, in order to eliminate the picketing, planned to install the electrical materials with its own employees. Further, according to Respondent, Hayward's attorney stated to Respondent's attorney the following day that the stored materials did not belong to Hayward, but, rather, belonged to Gossett and would be installed by Gossett or the cement masons.

It is apparent from the record, and Respondent acknowledges, that the question here is not whether Gossett and Hayward constitute a single employer, since they do not. Nor are the two of them involved in an integrated operation. Therefore, *Teamsters, Local 560*,¹⁴ relied on by Respondent, is not applicable, since the organizations there involved were integrated, and that fact was controlling.

¹⁴ *Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 560 (Curtin Matheson Scientific, Inc.)*, 248 NLRB 1212 (1980).

It is equally apparent that neither Gossett nor any other person or organization contemplated or did any struck work for Hayward. Only Hayward contracted to do, and did, all electrical installation and work relative thereto. Therefore, any reliance by Respondent upon a struck work theory as it applies to the ally doctrine is misplaced. Respondent cites a footnote from *Teamsters, Local 743*¹⁵ for the proposition that warehousing of materials for the primary employer creates an ally situation, but that case does not stand for such a proposition. In the text of *Teamsters, Local 743*, the Administrative Law Judge states, *inter alia*, "The struck work in issue is the loading, unloading, and warehousing of materials" "The record discloses that 70 percent of the materials received by Macmillan were reshipped without modification except for some repacking. This work was basic to Macmillan's entire operation. That factual situation is different from the factual situation involved in this case. Clearly, Hayward was not in "cahoots"¹⁶ with Gossett in order to have struck work continued behind, or in defiance of, the picket line.¹⁷

Finally, Respondent contends that the statement of Hayward's attorney to Respondent's attorney relative to ownership of the materials, which is referred to above, misled the Union into believing that Gossett had become an ally of Hayward by agreeing to perform struck work. That argument is without merit. Paul Simpson, Hayward's attorney, is credited in his denial that he told Nussbaum the materials belonged to Gossett, or that the cement mason would install the materials. In any event, regardless of the conversation between Nussbaum and Simpson, Nussbaum testified that, on a date he cannot remember but that apparently was on February 26, he was told by an NLRB representative that the representative understood the materials belonged to Hayward. Such a tenuous set of circumstances provides no basis for legalizing the picketing of Respondent.

It is found that Hayward and Gossett were not allies within the meaning of the Act and the law relating thereto at anytime relevant herein.

CONCLUSIONS OF LAW

1. By inducing and encouraging employees of subcontractors of a building project to refuse to work or to perform services in the course of their employment and thereby also coercing the general contractor, in each instance with an object of forcing the general contractor to cease doing business with Hayward, an employer, Respondent Union has engaged in an unfair labor practice within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.

2. The foregoing unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

¹⁵ *Warehouse, Mail Order, Office, Technical and Professional Employees Union, Local 743 (Macmillan Science Co., Inc.)*, 231 NLRB 1332 (1977).

¹⁶ 95 Cong. Rec. 8709 (1949), cited and quoted in Respondent's brief.

¹⁷ The fact that Hayward's attorney talked with Gossett about the picketing has been carefully considered and is given no weight.

THE REMEDY

Having found that the Union violated Section 8(b)(4)(i) and (ii)(B) of the Act, I shall recommend an order requiring it to cease and desist therefrom, and to post requisite notices at its meeting halls, and to supply notices for posting by Gossett and Hayward, if they are willing to do so.

In the Charging Party's brief there is a motion for the award of attorney's fees, based upon what is alleged to be frivolous litigation herein. The motion has been carefully considered and is denied.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹⁸

The Respondent, International Brotherhood of Electrical Workers, Local 595, Hayward, California, its officers, agents, and representatives, shall:

1. Cease and desist from inducing any individuals employed by subcontractors or any other employers on the Bank of America building at Hesperian Boulevard and Fairmont Drive in San Leandro, California, on which Hayward Electric Co. is the subcontractor, to refuse to work or render services in the course of their employment, and from coercing or restraining Gossett and Son, Inc., on said building site where, in either case, an object thereof is to force or require such general contractor or any other person engaged in commerce to cease doing business with Hayward Electric Co.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

- (a) Post at its meeting halls, copies of the attached notice marked "Appendix."¹⁹ Copies of said notice, on

¹⁸ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹⁹ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by

forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

- (b) Furnish said Regional Director signed copies of the aforesaid notice for posting by Hayward and Gossett, if they are willing, at places where they customarily post notices to their employees.

- (c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT induce or encourage any individuals employed by subcontractors or any other employers on the Bank of America building, Hesperian Boulevard and Fairmont Drive in San Leandro, California, on which Hayward Electric Co. is the electrical subcontractor to refuse to work or render service in the course of their employment.

WE WILL NOT restrain or coerce Gossett and Son, Inc., the general contractor on said building project, where, in either case, an object is to force or require such general contractor or any other person to cease doing business with Hayward Electric Co.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 595